Supreme Court, U.S.
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991208 JAN 18 2000

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

DEMETRIUS LAMBERT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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130PP

QUESTIONS PRESENTED

1. DOES A DISTRICT COURT, AFTER DELIBERATIONS HAVE COMMENCED AND AFTER ALTERNATE JURORS HAVE BEEN DISMISSED, VIOLATE DUE PROCESS AND DEFENDANT'S RIGHT TO BE PRESENT, WHEN THE COURT DISCHARGES A JUROR ON THE BASIS OF EX PARTE, UNSWORN, UNRECORDED/UNREPORTED PHONE CONVERSATIONS WITH THE JUROR - WITH CONSENT ONLY FOR THE COURT TO PHONE THE JUROR TO DETERMINE THE PROBLEM, AND WITHOUT CONSENT FOR THE CONTACT TO BE UNRECORDED/UNREPORTED, AND WITHOUT CONSENT FOR THE COURT TO ACT WITHOUT FURTHER INPUT FROM DEFENDANT OR HIS COUNSEL - THEREBY FORCING DEFENDANT TO HAVE HIS FATE DECIDED BY 11 JURORS?

2. WHERE OTHER-CRIMES "BAD MAN" EVIDENCE WAS SUBSTANTIAL AND VERY PREJUDICIAL, WAS DEFENDANT DENIED A FAIR TRIAL, IN VIOLATION OF 5th AMENDMENT DUE

PROCESS, BECAUSE THE JURY WAS NEVER INSTRUCTED ON THE LIMITED USE OF THIS EVIDENCE - NEITHER AFTER FINAL ARGUMENTS, NOR WHEN THE EVIDENCE WAS ADMITTED - THEREBY PERMITTING THE JURY TO CONSIDER THIS OTHER-CRIMES, BAD MAN EVIDENCE WITHOUT ANY JUDICIAL GUIDANCE?

PARTIES INVOLVED

Petitioner, Demetrius Lambert, was the defendant in the United States District Court for the Northern District of Illinois, Eastern Division, and the appellant in the United States Court of Appeals for the Seventh Circuit.

Respondent, United States of America, was the plaintiff in the United States District Court for the Northern District of Illinois, Eastern Division, and the appellee in the United States Court of Appeals for the Seventh Circuit.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Demetrius Lambert (defendant) prays that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the 7th Circuit, affirming the judgment of the U.S. District Court for the Northern District of Illinois, Eastern Division.

Opinion and Order Below

The Opinion of the 7th Circuit, No. 97-2834, filed September 8, 1999 (App. A; App. 1-28), is reported, United States v. Neeley, et al., 189 F.3d 670 (7 Cir. 1999). On October 20, 1999, the 7th Circuit denied Lambert's timely-filed[1] petition for rehearing and rehearing en banc. (App. B; App. 29)

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[1] Defendant's Petition for rehearing/rehearing en banc was filed within the extended time allowed by order of the 7th Circuit.

Jurisdictional Statement

On September 8, 1999, the 7th Circuit filed its Opinion. (App. A; App. 1-28) Petition for rehearing (timely-filed within the extended time allowed) was denied on October 20, 1999. (App. B; App. 29) This Petition is timely filed within 90 days.

Jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

U.S. Const., Amend. V, provides, in pertinent part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

U.S. Const., Amend. VI, provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ."

STATEMENT OF THE CASE

Jurisdiction in the court of first instance is based on 18 U.S.C. § 3231, which provides that the district courts of the United States shall have original jurisdiction of all offenses against the laws of the United States. This cause arose as a prosecution of defendant, alleging offenses against the laws of the United States.

Defendant was convicted of conspiring to possess with intent to distribute cocaine (21 U.S.C. 846), conspiring to defraud the United States (18 U.S.C. 371), and conspiring to commit money laundering offenses (18 U.S.C. 1956(h)), and was sentenced to 360 months.

STATEMENT OF FACTS

Defendant was charged in 3 conspiracy counts of an 18-count indictment naming

a total of 21 defendants. (R 1) This was a five-week trial. The government presented evidence from which the 11-person jury concluded that defendant was guilty as charged.

Facts re Issue 1 (11-person jury)

Pages of the Transcript containing all pertinent facts re this issue (Tr. 3266-3301), are attached as App. C. (App. 31-93)

The jury was instructed on Friday afternoon, Dec. 6, 1996 (Tr. 3223-53), the 2 remaining alternates were discharged (Tr. 3249-53), and the 12 remaining jurors were thereupon sent to deliberate at 1:20 p.m. (Tr. 3263)

The court, before sending the jury to deliberate, stated in colloquy with counsel that at 4:30 that afternoon, the jurors were to be told they could go

home and return at 9:30 the following Monday morning. (Tr. 3258-59, 3262)

On the Monday morning following that Friday afternoon, the court reported to defense counsel that juror Mary Adam might not be able to continue to serve on the jury. (Tr. 3267-68) The court related that a message was received on Sunday, Dec. 8, 1996, on the court's telephone answering machine in chambers, from juror Mary Adam, indicating a possible problem with her continuing to serve on the jury. (Tr. Tr. 3267-68) She was unable to attend court on Monday, Dec. 9, 1996, because she had to attend a custody hearing concerning her grandchildren. (Tr. 3289)

Discussions with the defense demonstrated all defendants objected to continuing with 11 jurors if Mary Adam

were to be discharged; defendants sought to have the court retain at least one of alternates whom the court had discharged the previous Friday. (See Tr. 3268-86, 3289-3302.) Counsel for defendant Lambert expressly so suggested. (Tr. 3280-81) The prosecution refused to agree to recalling an alternate in place of a discharged juror. (Tr. 3289; see Tr. 3301-02)

Eventually the court had two telephone conversations with Mary Adam, which were not recorded or reported, culminating in the court's discharging her over the phone, without any input from the defense. The first of these conversations was on Monday, Dec. 9, 1996, prior to a scheduled 1 p.m. Kane County hearing involving custody of her grandchildren (Tr. 3272-73); the second,

on Monday, Dec. 9, 1996, about 4:05 p.m., after the said hearing, reporting she had been granted temporary custody of her daughter's three young children - ages 6, 3, and 6 months, and that another hearing date had been set for Dec. 23, 2 weeks off. (Tr. 3299) While defendants had agreed to have the court make further inquiry of Mary Adam by phone (Tr. 3271), there was no agreement that this telephonic contact not be recorded or reported, or that the court could discharge her without consultation with defendant or his counsel. (Tr. 3271) The following occurred:

> "THE COURT: Well, I did not call her. Do I have your permission to call her and at least get a better handle on the situation?
>
> MS. COUGHLIN: Yes.
>
> MR. LOPEZ: Yes, Judge.
>
> MR. BAILEY: *[Lambert's trial*

> *defense counsel]* That sounds intelligent to me, Judge, to find out if it is definite that she will be available in the morning. Fine.
>
> THE COURT: All right. That is probably the better course of action.
>
> I do not, frankly, see -- I have given the others enough time to get here and I do not see -- **I have <u>at least</u> your permission to call her, everyone who is here?**
>
> MR. BAILEY: Yes.
>
> THE COURT: I think that is the prudent thing to do. Let me call her. Stay here and I will report back on the subject of my discussions with her. Okay?
>
> MS. COUGHLIN: That is fine." (Tr. 3271; App. C, App. 40-41) (Emphases added.)

Absent the consent of the prosecution (see Tr. 3289; Tr. 3301-02), the court refused to seek to recall either discharged alternate on defense request, but directed the jury to "commence its deliberations" (Tr. 3302) with a jury of 11 persons, over defense objections, and

denied defendant's motion for mistrial. (Tr. 3302)

Facts re Issue 2 (Lack of Any Limiting Instruction re Other Crimes Evidence)

In making its case, the prosecution relied on the testimony of nine (9) guilty-pleading persons (most, co-defendants), all with plea agreements whereby they were to receive substantial benefits with respect to the dispositions of their pending charges as a result of their testimony in this case. A part of the plea agreement of each of these witnesses was to testify truthfully in this case, in exchange for which the government would make certain recommendations.

The prosecution also relied on evidence that one of those witnesses, Toby Hill, had been shot and put in a

car trunk in an apparent kidnaping, though this activity was not connected to defendant or to any of the co-defendants. (Tr. 1434-41)[2] The court allowed the evidence as indicative of the "flavor" of the drug business. (Tr. 1437) Also admitted was evidence of two other separate shootings (Tr. 103; 370-71; 377; 436) - neither related to the charges of the case on trial.

The prosecution further relied on substantial other-crimes/bad act evidence regarding possession of weapons (Tr. 458-62, 513-20), and the court failed to instruct the jury as to the limited purpose for which such evidence could be considered - either at the time

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[2] A major co-conspirator, Nate Hill, was a fugitive at the time of trial. The evidence does not purport to link him to this activity either.

of its admission, or in the final charge to the jury. (See jury charge, Tr. 3223-52.)

REASONS FOR GRANTING CERTIORARI

1. A DISTRICT COURT, AFTER DELIBERATIONS HAVE COMMENCED AND AFTER ALTERNATE JURORS HAVE BEEN DISMISSED, VIOLATES DUE PROCESS AND DEFENDANT'S RIGHT TO BE PRESENT, WHEN THE COURT DISCHARGES A JUROR ON THE BASIS OF EX PARTE, UNSWORN, UNRECORDED/UNREPORTED PHONE CONVERSATIONS WITH THE JUROR - WITH CONSENT ONLY FOR THE COURT TO PHONE THE JUROR TO DETERMINE THE PROBLEM, AND WITHOUT CONSENT FOR THE CONTACT TO BE UNRECORDED/UNREPORTED, AND WITHOUT CONSENT FOR THE COURT TO ACT WITHOUT FURTHER INPUT FROM DEFENDANT OR HIS COUNSEL - THEREBY FORCING DEFENDANT TO HAVE HIS FATE DECIDED BY 11 JURORS.

The District Court's action in discharging a juror in such ex parte manner, violates due process and defendant's right to be present at all crucial judicial procedures.

The constitutional right to be present at every meaningful stage of trial - protected by due process, Snyder

v. Massachusetts, 291 U.S. 97, 105-06, 78 L.Ed. 674, 678 (1934), and "rooted to a large extent in the Confrontation Clause of the Sixth Amendment," United States v. Gagnon, 470 U.S. 522, 526, 84 L.Ed.2d 486, 490 (1985), and as codified by F.R.Cr.P. 43(a) - extends to all contacts between the court and a deliberating jury. Rogers v. United States, 422 U.S. 35, 45 L.Ed.2d 1 (1975); United States v. Neff, 10 F.3d 1321, 1323-24 (7 Cir. 1993).

The court's communications with Juror Adam, were communications with a still-impaneled member of a deliberating jury.

This is a crucial and important issue for this Court to decide - because at issue is whether due process requires recording or transcription of phone conversations between judge and jurors,

and whether courts can make an ex parte decision about discharge of jurors - an issue that often may arise, and for which this Court must set a standard for the district courts.

Defendant's right to a jury of 12 persons, although not constitutionally mandated, Williams v. Florida, 399 U.S. 78, 26 L.Ed.2d 446 (1970), is an expected part of the American Justice system. Ibid. The act of a Judge in communicating with members of a jury (whether to reduce their number, or for other reasons) is regulated by procedural due process. Rogers v. United States, 422 U.S. 35, 45 L.Ed.2d 1 (1975). Part of the requisite procedural due process is the ability to memorialize what occurred between judge and jury - to assure that higher

tribunals can evaluate what occurred. It is required that the conversation be recorded, and that no judicial action be taken without input of defendant's counsel. Rogers, supra; see also United States v. Neff, 10 F.3d 1321, 1324-25 (7 Cir. 1993), where the Court of Appeals reversed due to an unrecorded contact between the district court and a deliberating jury, stating:

> "A record of these proceedings, whatever they were, is essential. If the district court had conducted its communications [with the jury] in open court as required by *Rogers*, then, pursuant to the Court Reporter's Act, 28 U.S.C. § 753(b), the district court would have been required to have a court reporter present at the proceedings." Id. at 1324.

Here, the Court of Appeals held that defendant's due process rights were complied with - because counsel for defendant had agreed that the court

could contact the jury to see what the problems are. (App. A, App. 14-15; 189 F.3d at 679)

The 7th Circuit enlarged consent by the defense for the court to obtain information, into consent for the court to act without opportunity for defense input, and consent to allow discussions between judge and juror to be "unrecorded." The Opinion is wrong, because defendant and counsel only agreed to the court's request to INITIALLY call juror Adam. (Tr. 3271; App. C, App. 40-41; see quotation at pp. 7-8, supra.) The court's exact language to defendant and counsel, clarifying the scope of the defense consent, was:

> "THE COURT: Well, I did not call her. Do I have your **permission to call her and at least get a better handle on the situation?**
>
> MS. COUGHLIN: Yes.

> MR. LOPEZ: Yes, Judge.
>
> MR. BAILEY: *[Lambert's trial defense counsel]* That sounds intelligent to me, Judge, to find out if it is definite that she will be available in the morning. Fine.
>
> THE COURT: All right. That is probably the better course of action.
>
> I do not, frankly, see -- I have given the others enough time to get here and I do not see -- I **have <u>at least</u> your permission to call her, everyone who is here?**
>
> MR. BAILEY: Yes.
>
> THE COURT: I think that is the prudent thing to do. Let me call her. Stay here and I will report back on the subject of my discussions with her. Okay?
>
> MS. COUGHLIN: That is fine." (Tr. 3271; App. C, App. 40-41) (also at App. A, App. 10; 189 F.3d at 677) (Emphases added.)

This agreement was a LIMITED CONSENT for the court to call her. It was NEVER consent to unrecorded/unreported FURTHER phone calls. It was NEVER consent for the court to proceed, without a SWORN

statement by the juror; without the juror being questioned by counsel for defendant directly, or through the court with questions submitted by counsel as to her assertions as to why she could not continue to serve; and without the court advising counsel and defendant of the juror's assertions of the problem, so they could present their positions to the court, for the court to consider in determining what to do.

Consent must be knowingly and voluntarily given, Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461 (1938), and hence, limited consent is not consent to broader, greater intrusions of defendant's rights. Florida v. Jimeno, 500 U.S. 248, 251, 114 L.Ed.2d 297, 302-03 (1991). See, e.g., United States v. Elliott, 107 F.3d 810, 814-16 (10 Cir.

1997), applying Florida v. Jimeno, supra; accord, per 7th Circuit, McGann v. Northeast Illinois Reg. Commuter R.R., 8 F.3d 1174, 1180 (7 Cir. 1993), quoting Judge Swygert in United States v. Dichiarinte, 445 F.2d 126, 129-30 n.3 (7 Cir. 1971).

In Florida v. Jimeno, supra, a 4th Amendment case, this Court stated:

> "The standard for measuring the scope of a suspect's consent ... is that of 'objective' reasonableness - what would the typical reasonable person understand by the exchange between the officer and the suspect?" 500 U.S. at 251, 114 L.Ed.2d at 302.

Here, the court's statement: "I have at least your permission to call her..." (Tr. 3271; see pp. 7-8 & 15-16, supra; App. A, App. 10; App. C, App. 41; 189 F.3d at 677) - demonstrates that under an objective standard, as per Jimeno, there was consent by the defense only

for the court to obtain facts, especially where the rule of law as per United States v. Rogers, 422 U.S. 35, 45 L.Ed.2d 1 (1975), required (a) recording and (b) input from defendant and counsel.

This Court must grant certiorari to decide whether a limited consent, as here, can be used by a district court to justify (a) holding unrecorded phone conversations between judge and juror; and to justify (b) ex parte decision, providing the defense with no feed back as to new facts, and no opportunity to suggest alternative action.

2. WHERE OTHER-CRIMES "BAD MAN" EVIDENCE WAS SUBSTANTIAL AND VERY PREJUDICIAL, DEFENDANT WAS DENIED A FAIR TRIAL, IN VIOLATION OF 5th AMENDMENT DUE PROCESS, BECAUSE THE JURY WAS NEVER INSTRUCTED ON THE LIMITED USE OF THIS EVIDENCE - NEITHER AFTER FINAL ARGUMENTS, NOR WHEN THE EVIDENCE WAS ADMITTED - THEREBY PERMITTING THE JURY TO CONSIDER THIS OTHER-CRIMES, BAD MAN EVIDENCE WITHOUT ANY JUDICIAL GUIDANCE.

Due process requires that the limiting instruction given to the jury on how to consider other crimes ("bad man") evidence, be given, at the very moment that such evidence is presented to the jury, instead of only providing such a limiting instruction at the end of all evidence.[3] Here, no limiting instruction re how to consider the other

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[3] This argument is most compelling here, where the evidence of guilt is essentially "bad man" evidence, and testimony of informers, whose testimony must be considered with great care and caution. On Lee v. United States, 343 U.S. 747, 757, 96 L.Ed. 1270, 1277 (1952).

crimes/bad man evidence, was ever given.

Evidence of other crimes is highly prejudicial,[4] and its improper admission may be so prejudicial as to deny due process. Michelson v. United States, 335 U.S. 469, 475-76, 93 L.Ed. 168, 173-74 (1948); Old Chief v. United States, 519 U.S. 172, 136 L.Ed.2d 574 (1997); Henry v. Estelle, 993 F.2d 1423 (9 Cir. 1993); McKinney v. Rees, 993 F.2d 1378 (9 Cir. 1993); I WIGMORE, EVIDENCE § 57 (3d ed. 1940). It is very prejudicial because it affects how the jury evaluates evidence. Crotts v. Smith, 73 F.3d 861 (9 Cir.

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[4] "The deep tendency of human nature to punish, not because [the defendant] is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury." I WIGMORE, EVIDENCE § 57 (3d ed. 1940).

1996). The jury may choose to convict because they believe the defendant is a bad man. Michelson; Old Chief; United States v. Copelin, 996 F.2d 379 (D.C. Cir. 1993). Therefore, such evidence is admissible, only if joined by a limiting instruction that is designed to regulate [limit] the jury's use of such evidence - and not permit the jury to convict defendant because they think he is a "bad man."[5] United States v. Johnson, 102 F.3d 214, 222 (6 Cir. 1996) (failure

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[5] Although defendant specifically and separately argued on appeal that he was denied a fair trial because the court failed to give the jury appropriate and timely limiting instructions as to the other-crimes evidence (Def. Br. Point II(B), pp. 33, 45-47), the 7th Circuit addressed the issue of no limiting instructions only in terms of defendant's separate argument that he received ineffective assistance of counsel because counsel did not request limiting instructions. (App. A, App. 23-24; 189 F.3d at 684)

to instruct re limited use of bad man evidence denied a fair trial); see Estelle v. McGuire, 502 U.S. 62, 116 L.Ed.2d 385 (1991), holding by implication that due process would be violated if the limiting instruction did permit the "bad man inference."

The common practice has been to provide such a limiting instruction with all other instructions, only at the end of trial. Because of the human nature of jurors, and how bad man evidence affects them,[6] providing a limiting instruction only at the end of the evidence after

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[6] Striking improperly admitted bad man evidence may not cure the error, because of the highly prejudicial nature of such evidence. United States v. Jenkins, 7 F.3d 803 (8 Cir. 1993) (reversal for improper bad man evidence, despite attempted curative measures); Dunn v. United States, 307 F.2d 883, 886 (5 Cir. 1962) ("'[I]f you throw a skunk into the jury box, you can't instruct the jury not to smell it'.")

final arguments is insufficient to insure that the jury is not (when they consider prosecution testimony) tainted by their belief that defendant is a bad man. If no instruction is given when the bad man evidence is admitted, the jury will consider it as bad man evidence.

In Copelin, the Court of Appeals, adopting Judge Bazelon's language from United States v. McClain, 440 F.2d 241, 246 (D.C. Cir. 1971), held:

> "[W]henever evidence is admitted only for a limited purpose, it is plain error...to omit an **immediate** cautioning instruction. **The danger of prejudicial effect from such evidence is so great that only an IMMEDIATE and CONTEMPORANEOUS instruction can be considered sufficient to protect defendants.**" Copelin, 996 F.2d at 384 (Emph. added), citing Jones v. United States, 385 F.2d 296 (D.C. Cir. 1967); United States v. Bussey, 432 F.2d 1330 (D.C. Cir. 1970).

To insure that jurors only apply the bad man evidence for the limited purpose for

which it was admitted, instead of the jurors accepting the prosecution testimony "hook, line and sinker" because they believe defendant is an evil man, the jury must receive the limiting instruction at the time the bad man evidence is first presented, whether in opening argument or in prosecution testimony. Copelin, 996 F.2d at 384.

There is no policy reason why the instruction should not be given at the earliest opportunity.

Therefore, just as due process requires exclusion of immaterial, irrelevant "bad man" evidence - Michelson, Old Chief, Henry v. Estelle, McKinney v. Rees, Crotts v. Smith, all, supra p. 21 - and requires exclusion of other crime evidence where prejudicial effect outweighs probative value, Old

Chief, and requires limiting instruction, where the jury is permitted to consider evidence for a limited purpose, United States v. Johnson, supra, 102 F.3d at 222; Estelle v. McGuire, supra, so, too, due process requires that such a limiting instruction must be given when the other-crimes evidence is admitted.

Certiorari should be granted because other crimes evidence is presented in a good percentage of criminal cases, both State and federal, and hence the problem of when an instruction should be given is a serious, national problem, requiring this Court to hold that due process requires that the appropriate other-crimes limiting instruction must be given when the evidence is first referred to in argument and when the

evidence is admitted before the jury.

CONCLUSION

For the foregoing reasons, certiorari should be allowed.

FREDERICK F. COHN
Attorney for Petitioner

APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

Nos. 97-2116, 97-2729 & 97-2834

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SHARON NEELEY, also known as SHARON HILL, ALBERT A. ALVAREZ, THOMAS D. LAMBERT, also known as DEMETRIUS, DONALD L. JAMES, ALEX BURROWS, MEATRIES, D., T., and THOMAS LAMBERT,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 CR 730—**Charles P. Kocoras**, *Judge.*

ARGUED FEBRUARY 10, 1999*—DECIDED SEPTEMBER 8, 1999

Before COFFEY, FLAUM, and EASTERBROOK, *Circuit Judges.*

COFFEY, *Circuit Judge.* On December 13, 1995, defendants-appellants Thomas Demetrius Lambert ("Lambert"), Sharon Neeley ("Neeley"), and Albert Alexander Alvarez ("Alvarez"), along with eighteen other defendants, were charged in an eighteen count indictment with criminal drug violations. Count One charged Lambert, Alvarez, and others with conspiring to possess with intent to distribute

* Appeal No. 97-2116 was submitted on the briefs and record without oral argument.

cocaine, in violation of 21 U.S.C. § 846. Count Six charged Lambert, Neeley, and others with conspiring to defraud the United States, in violation of 21 U.S.C. § 371. Count Seven charged Lambert, Neeley, and others with conspiring to commit money laundering offenses, in violation of 18 U.S.C. § 1956(h). Counts Eight and Nine charged Neeley with money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i).

On November 4, 1996, Alvarez pled guilty to Count One of the indictment pursuant to a written plea agreement. On February 2, 1997, Alvarez filed a pro se motion to withdraw his guilty plea. The district court denied the motion to withdraw on March 5, 1997. Almost a month later, on April 2, 1997, Alvarez filed a renewed pro se motion to vacate his guilty plea, this time attaching four affidavits from other inmates testifying to his mental instability in support of his motion. On April 23, 1997, Alvarez made a motion for a psychological evaluation, at which time the district judge denied both the second motion to vacate the plea and the motion for a psychological evaluation. On June 26, 1997, the district court sentenced Alvarez to 135 months' imprisonment for conspiracy to distribute cocaine.

Lambert and Neeley's trial commenced on November 4, 1996, and the jury found Lambert guilty of Counts One, Six, and Seven, and Neeley guilty of Counts Six, Seven, Eight, and Nine of the original indictment on December 12, 1996. Thereafter, Neeley was sentenced to 97 months' imprisonment for the money laundering offenses on May 5, 1997. Lambert was sentenced to 360 months' imprisonment for conspiracy to distribute cocaine on July 8, 1997.

On appeal, Lambert argues that: 1) the trial judge erred in refusing to grant the motion for a mistrial after excusing a juror after deliberations had begun and proceeding with 11 jurors, rather than the 12 originally impaneled; 2) the trial judge violated his Fifth Amendment right to a fair trial by admitting evidence that other conspiracy members had been shot as relevant to show the nature of

the drug conspiracy; 3) the trial judge erred by admitting evidence that Lambert possessed firearms during the course of the drug conspiracy; and 4) he received the ineffective assistance of trial counsel. Neeley argues that the sentencing judge erred in refusing to sentence her as a minor participant under U.S.S.G. § 3B1.2. Finally, Alvarez argues that the district judge erred in refusing to allow him to withdraw his guilty plea and abused his discretion in denying his motion for a psychological evaluation. We affirm.

I. BACKGROUND

Between 1987 and 1995, Nathan Hill ("Hill")[1] and his drug organization were responsible for distributing well over 2000 kilograms of cocaine in the Chicago area, obtaining most of the cocaine from suppliers in California, and generating over $15 million in profits.

Thomas Demetrius Lambert

Lambert, while involved in the drug enterprise, purchased cocaine from California and transported it to Chicago, routinely handling large amounts of cocaine and money. Lambert was also responsible for picking up cars from various locations in Indiana and Illinois that had been outfitted with secret compartments for use in the transporting of the cocaine. He would deliver the cocaine to various customers and turn the proceeds over to Hill or one of Hill's minions. Furthermore, Lambert would arrange to retrieve the cocaine from the couriers traveling from California at hotels in downtown Chicago, Illinois, as well as Lansing, and Hammond, Indiana. Lambert paid the couriers in cash and gave them a one-way return ticket to Los Angeles.[2]

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[1] Hill was a fugitive from justice at the time of Lambert and Neeley's trial.

[2] The tickets were purchased with cash using a fake name.

Lambert and others were also called upon from time to time to count the cash from the proceeds of the cocaine sales at one of Hill's apartments in Lansing, Indiana. On one particular occasion, Lambert and others counted, with the aid of a money counting machine, approximately $1 million.[3] Finally, Lambert was responsible for unpacking the cocaine from the secret compartments in various vehicles and repacking the compartments with as much as $600,000 cash.

Sharon Neeley

Sharon Neeley, Nate Hill's older sister, was involved in the conspiracy to launder drug proceeds for the Hill organization by participating in the purchasing of residential and rental real estate properties, and assisting in the investment in businesses such as a record producing company called "Pocketown Records" and a tour bus company called "American Tour and Travel." The following evidence was presented at trial concerning the assistance Neeley provided to the Hill drug organization.

1. Polk Street Apartment Building

In 1988, Neeley purchased an apartment building on Polk Street in Chicago for Hill using $30,000 cash obtained through Hill's drug trafficking business. Approximately six months after the building was purchased, Hill paid contractors to renovate the building, including new windows, electrical work, and plumbing work. All this work was paid for in cash.

Neeley originally listed herself as the owner of the building, but in January 1990 she transferred the building into a land trust with the beneficial interest passing upon her death to Mary Hill (Hill and Neeley's mother);

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[3] The record does not reflect the date that Lambert counted the $1 million.

her brothers, Nate and Toby Hill; her son, Michael Hill; and her nephew, David Hill. In May 1990, Neeley amended the trust agreement so that the interest passed only to her mother.

2. Flossmoor House

On November 21, 1991, Neeley, her husband, Larry Neeley, and Mary Hill, entered into an installment contract with the seller to purchase a house at 1801 Lawrence Crescent, Flossmoor, Illinois, for $235,000. The contract, signed by all four parties, provided for earnest money of $20,000 to be held in escrow, $30,000 to be brought to the initial closing, monthly installment payments of $1,623.51, and the remaining balance of the contract to be due on December 6, 1993.

Records from the Beverly Bank in Cook County, Illinois, revealed that three cashier's checks and one personal check were deposited into the escrow account on October 30, 1991, and used as earnest money for the Flossmoor house. The three cashier's checks were each in the amount of $4,500; listed the remitters as Sharon Neeley, Larry Neeley, and Mary Hill; and were funded with cash from the sale of narcotics. Drug proceeds were also used to make cash deposits in Neeley's Citicorp account of $2,095, $3,000, and $1,500 on October 8th, 15th, and 17th, respectively, in order for Neeley to write a $6,500 personal check for the Flossmoor house on October 22, 1991.

On December 6, 1991, the Neeleys and Mary Hill brought a combined $30,350.48 to the closing. The $30,350.48 was in the form of sixteen money orders and cashier's checks ranging in amounts from $1,500 to $3,500 and had been purchased over a four day period from seven different financial institutions. All of these banking instruments were funded with cash from Hill's drug organization.

The Neeleys also made monthly payments on the Flossmoor house to the seller of $2,023.51 from January 1992

through November 7, 1993 for a total of $47,412.62. The payments were made from the Neeleys' personal bank account or with a money order from a currency exchange, and once again were funded with drug money. The final closing and payment of the full purchase price was on December 15, 1993. Neeley and Mary Hill brought in approximately $181,000 on that day.[4]

The seller signed a warranty deed and conveyed the property to Mary Hill. The Neeleys' names were originally on that deed and then were crossed off before the deed was recorded on January 21, 1994. Later that month, Mary Hill signed a Warranty Deed in Trust conveying the property to a Beverly Bank trust. That deed was recorded February 14, 1994. The trust stated that the entire beneficial interest in the property belonged to Mary Hill and upon her death to Neeley.

3. Matteson House

The Neeleys entered into a contract to purchase a piece of property in Matteson, Illinois for $145,000 on October 9, 1992. On October 14, 1992, the Neeleys made a $7,000 deposit with Century 21 as earnest money for the purchase of this property. On March 3, 1993, the installment agreement was executed by the Neeleys and the seller, and at that time the Neeleys presented a down payment of $22,000 in the form of seven financial instruments, which included personal checks, cashier's checks, and money orders from five different financial institutions, that were funded by drug proceeds. After the purchase, the Neeleys lived in the Matteson house.[5]

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[4] This money was in the form of money orders, cashier's checks, and Pocketown business checks, all funded with drug money.

[5] For reasons unexplained in the trial record, Neeley applied for a mortgage for this piece of property in 1994. In order to qualify for the mortgage, Neeley supplied the mortgage company with a

(continued...)

4. "American Tour and Travel" and "Pocketown Records"

One of Hill's methods to hide the proceeds of his drug business was to launder money through a bus company he invested in called American Tour and Travel Bus Company ("American") by having subordinates in the drug organization deliver duffel bags of cash to Charles Thomas ("Thomas"). American acted as the parent company for and financed another venture of Hill's known as Pocketown Records, Inc. ("Pocketown"), a record producing business.

Hill put Neeley in charge of Pocketown's financial transactions, including Pocketown's bills, corporate papers, stock certificates, and contracts. Because Hill frequently traveled to New York, Neeley assisted Thomas in locating an apartment on Hill's behalf in New York in February of 1993. Thomas, using American as a guarantor, rented this apartment for Pocketown with a payment of $16,000 down and $4,000 each month thereafter. A month later, Pocketown rented another apartment in New York for approximately $2,800 per month. When leasing this apartment, Neeley represented herself to the lessor as the manager of Pocketown.

Also in 1993, Pocketown opened four checking accounts, one at Ashland Bank in Chicago, one at Old Kent Bank in Chicago, one at South Shore Bank in Chicago, and one at the Republic Bank in New York. Neeley was the sole signatory on the Ashland and South Shore accounts, and she opened the South Shore account with a $25,000 check from Vernon Harrison, who was a drug customer of Hill's. Neeley was responsible for paying Pocketown expenses and depositing various cash amounts into Pocketown accounts.

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[5] (...continued)
false copy of a 1993 federal income tax return that she represented had been filed with the IRS. According to the government, no such tax return was ever filed.

Albert Alexander Alvarez

Alvarez was one of the many couriers who brought cocaine from California to the Hill organization in Chicago. On November 4, 1996, in a written plea agreement, Alvarez admitted that beginning in December of 1992 and continuing until January 23, 1993, he conspired to distribute cocaine. Alvarez admitted making seven trips by commercial airlines from California to Chicago while transporting luggage filled with between 5 to 10 kilograms of cocaine which he delivered to Hill's subordinates.

After pleading guilty, Alvarez learned that an individual in Hill's organization, who was in the same position as Alvarez, went to trial and was acquitted. Shortly thereafter, Alvarez filed a pro se motion to withdraw his guilty plea on February 2, 1997, claiming that he lacked the required mental state when he entered into a guilty plea with the government. On March 5, 1997, the district court denied the motion to withdraw the plea because "it [was] quite clear that Mr. Alvarez was not suffering from any inability, mental or otherwise, to understand the nature and extent of the proceedings and the full consequences of his plea of guilty." On April 2, 1997, Alvarez filed a renewed pro se motion to vacate his guilty plea along with affidavits from four fellow inmates recounting his alleged psychiatric instability. On April 23, 1997, Alvarez filed a motion requesting a psychological evaluation. The district court denied the second motion to vacate the plea and the motion requesting a psychological evaluation.

II. ISSUES

On appeal, Lambert argues that: 1) the trial judge erred in refusing to grant his motion for a mistrial upon excusing a juror and proceeding with 11 jurors over the defendants' objection; 2) the trial judge violated his Fifth Amendment right to a fair trial by admitting evidence that other conspiracy members had been shot as relevant evidence of the nature of the drug conspiracy; 3) the trial judge erred by admitting evidence that Lambert possessed

firearms during the course of the drug conspiracy; and 4) he received the ineffective assistance of trial counsel. Neeley argues that the sentencing judge erred in refusing to sentence her as a minor participant under U.S.S.G. § 3B1.2. Finally, Alvarez argues that the district judge erred in refusing to allow him to withdraw his guilty plea and abused his discretion in denying his motion for a psychological evaluation.

III. ANALYSIS

Thomas Demetrius Lambert

A. The trial court's decision to proceed with 11 jurors

Defendant-appellant Lambert asserts that the trial judge erred in refusing to declare a mistrial upon excusing juror Mary Adam ("Adam") for "just cause" and proceeding, in spite of the defendants' objections, with eleven jurors. He argues that the district court's contact with Adam violated his constitutional rights; that the district court's investigation into Adam's stated reasons for her unavailability was insufficient; and that once Adam was excused, an alternate juror should have been substituted. We review a district court's decision to discharge a juror and proceed with eleven jurors for an abuse of discretion. *See United States v. Patterson*, 23 F.3d 1239, 1252 (7th Cir. 1994).

On Friday, December 6, 1996, Lambert's jury was instructed and the two remaining alternate jurors were discharged. At 1:20 p.m., that same day, the jury began deliberating Lambert's fate, but were unable to reach a verdict by 4:30 p.m. Accordingly, they were told to go home for the weekend and to return at 9:30 a.m. the following Monday, December 9, 1996. On Monday morning, before the jury reconvened, the trial judge informed the prosecuting attorney, the defendants, and their attorneys, that a juror, Mary Adam, had left a message on the district court's answering machine in chambers stating that she would not be present because there was a cus-

tody hearing regarding her daughter's children. In the presence of Lambert and his attorney, the court summarized the nature of the message, stating:

> [i]n any event, the message that was left essentially is as follows: That she has to attend a custody hearing today because DCFS is trying to take the kids away—this is plural. She apologizes for causing you a problem, and says I can replace her and the hearing is in Kane county.

After explaining the nature of the message to the parties, the district court and all parties present, including Lambert and his attorney, agreed that the court should determine whether Adam could continue to deliberate and the following discussion took place:

> THE COURT: Well, I did not call her. Do I have your permission to call her and at least get a better handle on the situation?
>
> MS. COUGHLIN: Yes.
>
> MR. LOPEZ: Yes, Judge.
>
> MR. BAILY [counsel for Lambert]: That sounds intelligent to me, Judge, to find out if it is definite that she will be unavailable in the morning. Fine.
>
> THE COURT: All right, That is probably the better course of action. I do not, frankly, see—I have given the others enough time to get here and I do not see—I have at least your permission to call her, everyone who is here?
>
> MR. BAILY: Yes.
>
> THE COURT: I think that is the prudent thing to do. Let me call her. Stay here and I will report back on the subject of my discussion with her. Okay?
>
> MS. COUGHLIN: That is fine.
>
> THE COURT: All right.

After talking with Adam, the trial judge returned to the bench and summarized the details of his conversation with Adam to the parties, stating:

> I did talk to Ms. Adam. She is obviously in some state of anxiety. There is a 1:00 o'clock hearing today in Kane County before Judge Morgan. It involves the three children of her daughter, although she says—Ms. Adam says—it is only with respect to this one incident and this kid; and, the way it sound [sic] from Ms. Adam, DCFS has jumped the gun and come to conclusions that are entirely inappropriate and unsupported. You could tell that in her voice—that there is nothing there, according to Ms. Adam.
>
> She does feel mentally drained; and, I asked her mental state: Assuming everything was okay, whether she could come back here and deliberate with a decent mental state. And she and I both agreed that the only answer to that question is what will come out of the hearing.

After the custody hearing, the trial judge and Adam had a second, unrecorded telephone conversation on Monday, December 9, 1996, at approximately 4:05 p.m. The next morning, the district judge relayed the details of the conversation to the lawyers, stating:

> [h]ere is the situation with Mary Adam. She did call me about 4:05 p.m., and here is the story. Mary Adam has been awarded temporary custody of her daughter's three children. The ages are six, three and six months. She now has three more children to care for than she had before yesterday's session.
>
> She, therefore, will be unable to come back and act as a juror in this case.
>
> The baby is still in the hospital, but she will get the baby as soon as the child is released.
>
> There is a new hearing set for the 23rd of December, which is two weeks off. And she has custody of two of the children, with the third coming. There is no way in the world that she can come here and complete her service as a juror.

> Beyond that, she also in her own way in her words said she does not know whether, in light of the case that she is now embroiled in by virtue of her daughter's situation, [sic] could be a juror in this case.

Based on these facts, the trial judge excused Adam from jury service in this case and ordered the remaining eleven jurors to continue to deliberate.

On appeal, Lambert argues that the method by which the district court dismissed Adam as a juror violated his rights under the 5th and 6th Amendments to the United States Constitution because Adam was discharged "via *ex parte* telephonic contacts, unrecorded and unreported, between the judge and the juror, out of the presence of the defendant and his lawyer . . . ."

> A criminal defendant's right to be present at every stage of trial is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 1484, 84 L. Ed.2d 486 (1985) (citing *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 1058, 25 L. Ed.2d 353 (1970)), and is protected to some extent by the due process clause of the Fifth and (in state cases) the Fourteenth Amendment. *See Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 332, 78 L. Ed. 674 (1934) (under due process, a criminal defendant has the right to be present "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."). However, the defendant's right of presence has been codified under the Federal Rules of Criminal Procedure. Under Fed. R. Crim. P. 43(a)[6] a criminal defendant has a

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[6] Rule 43(a) provides in full:

> The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at

(continued...)

> right to be present (if he desires) during all stages of his trial, which has been held to include the giving of supplementary jury instructions or other communications with a deliberating jury. *United States ex rel. S.E.C. v. Billingsley*, 766 F.2d 1015, 1019 (7th Cir. 1985) (citing *Rogers v. United States*, 422 U.S. 35, 39, 95 S. Ct. 2091, 2094, 45 L. Ed.2d 1 (1975)); *United States v. Silverstein*, 732 F.2d 1338, 1348 (7th Cir. 1984), *cert. denied*, 469 U.S. 1111, 105 S. Ct. 792, 83 L. Ed.2d 785 (1985). The procedures a district judge should follow when presented with a communication from a deliberating jury were first set forth in *Rogers v. United States*, 422 U.S. 35, 95 S. Ct. 2091, 45 L. Ed.2d 1 (1975). *In that case the Supreme Court stated that in such instances: (1) the jury's questions should be answered in open court; and (2) defendant's attorney should be given an opportunity to be heard before the district judge responds to the jury's questions. Id.* at 39, 95 S. Ct. at 2094. In *United States v. Burns*, 683 F.2d 1056 (7th Cir. 1982), *cert. denied*, 459 U.S. 1173, 103 S. Ct. 821, 74 L. Ed.2d 1018 (1983), this circuit noted the significance of the defendant's rights under Fed. R. Crim. P. 43(a), and stated that "the district courts in this Circuit should make every effort to observe the procedures endorsed in the *Rogers* opinion." 683 F.2d at 1058 n.1. *We reaffirmed our seriousness in adopting the Rogers procedures two years later in Billingsley, where we held that a district judge, when faced with such communications from the jury, should either follow the procedures in Rogers, or obtain from the defendant himself a clear and knowing waiver on the record. Billingsley*, 766 F.2d at 1020.

United States v. Neff, 10 F.3d 1321, 1323-24 (7th Cir. 1993) (footnote and citation in original) (emphasis added).

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[6] (...continued)

> the imposition of sentence, except as otherwise provided by this rule.

As the Supreme Court has repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Rose v. Clark*, 478 U.S. 570, 579 (1986); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

In this case, Lambert and his counsel were present when the trial judge explained that Adam had left a message on the court's answering machine. After carefully relaying the contents of that message, the trial judge discussed the various procedural options available to all the parties. Lambert's attorney, having had ample time to consult with his client, stated on two occasions that the judge had his permission to contact Adam and determine if she could continue serving on the jury. As soon as the judge learned of Adam's status, he relayed that information to the parties, explaining in great detail Adam's problems and the effect these problems would have on her ability to function as a juror in this case. Finally, it was only after determining that Adam had just obtained custody of three children, the youngest only six-months old and soon to be released from the hospital, that the trial judge excused Adam from the jury.

It is well established that the

> [f]ailure to secure the defendant's presence during communications between the judge and the jury violates Rule 43(a) *unless the judge answers the jury's question in open court after giving defense counsel a chance to object and the jury's question raises issues on which counsel is not likely to consult the defendant or for which the defendant would not be likely to have an answer that would sway the judge.*

United States v. Pressley, 100 F.3d 57, 59 (7th Cir. 1996) (citations omitted) (emphasis added).

In this case, Lambert was given more than ample opportunity to object to the judge's ruling as well as the method the district court judge fashioned in releasing Adam from further jury duty in the case. Not only did Lambert's counsel not object, but he affirmatively support-

ed the trial judge's decision to telephone Adam in order that he might discuss and ascertain her situation and status. Furthermore, we don't know of anything else the judge might have done to anticipate this present challenge in light of the lack of any objection on the part of the defendant or defense counsel. We heartily agree with the trial judge's decision that it would have been nigh unto impossible for Adam to give her full and undivided attention to the necessary and important duties of a juror, i.e. jury deliberations and discussions, which were to follow. With all the information in this record, which we consider very thorough, we refuse to hold that the judge committed error in using the procedure of the telephone interview questioning, which had been previously agreed upon by all the interested parties, dealing with the question of Adam's availability to proceed.

Defendant-appellant Lambert also argues that the record was insufficient to conclude that Adam was excused for "just cause" within the meaning of Federal Rule of Criminal Procedure 23. According to him, there was insufficient information to determine whether Adam's obtaining custody of three young children, the youngest of which was still in the hospital, constituted just cause for being excused from continued jury service. Lambert argues that the district court's finding of just cause was, therefore, an abuse of discretion.

The Federal Rules of Criminal Procedure provide that:

> [j]uries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. *Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.*

Fed. R. Crim. P. 23(b) (emphasis added). In *United States v. Araujo*, 62 F.3d 930 (7th Cir. 1995) we noted the rationale for allowing the trial judge to make the determination as to whether to continue with 11 jurors, stating:

> [t]he amendment to subdivision (b) addresses a situation which does not occur with great frequency but which, when it does occur, may present a most difficult issue concerning the fair and efficient administration of justice. This situation is that in which, after the jury has retired to consider its verdict and any alternate jurors have been discharged, one of the jurors is seriously incapacitated or otherwise found to be unable to continue service upon the jury. The problem is acute when the trial has been a lengthy one and consequently the remedy of mistrial would necessitate a second expenditure of substantial prosecution, defense and court resources. *See, e.g., United States v. Meinster*, 484 F. Supp. 442 (S.D. Fla. 1980), *aff'd sub nom. United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981) (juror had heart attack during deliberations after "well over four months of trial"); *United States v. Barone*, 83 F.R.D. 565 (S.D. Fla. 1979) (juror removed upon recommendation of psychiatrist during deliberations after "approximately six months of trial").
>
> It is the judgment of the Committee that when a juror is lost during deliberations, especially in circumstances like those in Barone and Meinster, it is essential that there be available a course of action other than mistrial.
>
> . . . . .
>
> The amendment provides that if a juror is excused after the jury has retired to consider its verdict, it is within the discretion of the court whether to declare a mistrial or to permit deliberations to continue with 11 jurors. If the trial has been brief and not much would be lost by retrial, the court might well conclude that the unusual step of allowing a jury verdict by

> less than 12 jurors absent stipulation should not be taken. On the other hand, if the trial has been protracted the court is much more likely to opt for continuing with the remaining 11 jurors.

Id. at 933 (quoting Rule 23 advisory committee's note).

We have gone on to explain that

> [b]efore dismissing a juror pursuant to Rule 23(b), the district court must render a finding that it is necessary to do so for just cause; *and if the record does not already make clear the precise nature or likely duration of the juror's inability to serve, the court bears an affirmative duty to inquire further into those circumstances.*

Id. at 934; *cf. United States v. Wilson*, 894 F.2d 1245, 1250-51 (11th Cir. 1990) (court was not obligated to contact absent juror or her physician where juror's history of illness and her recent telephone call to court clerk sufficiently established her incapacity); *United States v. Acker*, 52 F.3d 509, 515-16 (4th Cir. 1995) (no abuse of discretion in dismissing injured juror where court did not know where she was seeking medical treatment and thus was unable to contact her).

In the present case, the parties agreed that the trial judge should contact Adam and ascertain her situation. The judge did this and informed the parties that Adam was involved in a custody hearing concerning her grandchildren. Immediately after the custody hearing, the trial judge again spoke with Adam and learned that she was just awarded temporary custody of her three grandchildren, the youngest of whom was six months old and whose release from the hospital was imminent. Thus, she now had, in addition to whatever children were still living at home, the responsibility of caring for her three grandchildren. The judge relayed all this information to the parties. We agree with the district court judge's finding that it was impossible for Adam to continue serving as a juror because she would have been unable to give the proper

attention to the jury deliberations, the most vital part of the criminal trial.

More importantly, Adam expressed her own concerns with continuing, citing the stress of the hearing, custody of three new children, and what she described as unfounded charges against her daughter. Given Adam's added responsibilities, the fact that she had just been through a trying ordeal with the DCFS, and her admittedly affected mental state, we approve of the trial judge's finding of just cause for the excusing of Adam from continued jury service.

Lambert's final argument with respect to the decision to remove Adam from the jury is that the trial judge abused his discretion in failing to replace Adam with one of the alternate jurors who was discharged the previous Friday. As we shall see, this argument is without merit.

> After a jury begins to deliberate the district court must discharge all alternates. Fed. R. Crim. P. 24(c) ("An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict."). *The Rules provide no means by which a discharged alternate may be recalled after jury deliberations have begun. We have previously held that Rule 24(c) and the policy behind it "forbid the practice [of recalling alternates]." United States v. Josefik*, 753 F.2d 585, 587 (7th Cir.), *cert. denied*, 471 U.S. 1055, 105 S. Ct. 2117, 85 L. Ed.2d 481 (1985). The Fifth Circuit has recently held, reading Rules 23(b) and 24(c) together, that it is not proper to substitute a discharged alternate after jury deliberations have begun. *See United States v. Huntress*, 956 F.2d 1309, 1314-17 (5th Cir. 1992), *cert. denied*, 508 U.S. 905, 113 S. Ct. 2330, 124 L. Ed.2d 243 (1993).

Patterson, 23 F.3d at 1252 (citations in original) (emphasis added). As is clear from *Patterson* and the fact that alternate jurors have not heard all of the jury discussions and questioning up to that point, the district court is

without authority to recall an alternate juror once he or she has been dismissed and the jury has begun to deliberate. Because we see no good reason to revisit *Patterson*, nor has Lambert offered us one, we refuse to hold that the trial judge erred when he refused to recall an alternate juror after Adam was excused from continued jury service.

B. Admission of Evidence

Defendant-appellant Lambert also argues on appeal that the trial judge committed reversible error when he admitted evidence that members of the conspiracy had been shot and assaulted during the course of the conspiracy, and that Lambert possessed a weapon during the course of the conspiracy because the evidence constituted "other crimes/bad man" evidence, and was irrelevant and prejudicial.[7] We review the district court's decision to admit this evidence for an abuse of discretion. *See United States v. Lowis*, 174 F.3d 881, 883 (7th Cir. 1999).

> Evidence is relevant and admissible if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401 and 402. If the probative value of evidence is "substantially outweighed by the danger of unfair prejudice," then the evidence may be excluded. Fed. R. Evid. 403. However, our decisions have emphasized that most relevant evidence is, by its very nature, prejudicial, and that evidence must be unfairly prejudicial to be excluded. *United States v. McNeese*, 901 F.2d 585, 599 (7th Cir. 1990). "Evidence is unfairly prejudicial only if it 'will induce the jury to decide the case on an improper basis, commonly an

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[7] We note that at no point during the trial did the prosecution attempt to portray Lambert as the person who shot any member of the conspiracy.

> emotional one, rather than on the evidence presented.'" *United States v. Vretta*, 790 F.2d 651, 655 (7th Cir. 1986), *cert. denied* 479 U.S. 851, 107 S. Ct. 179, 93 L. Ed.2d 115 (1986) (quotation omitted).

United States v. Pulido, 69 F.3d 192, 201 (7th Cir. 1995).

As the trial court determined, the shooting and assault of members of the conspiracy was relevant to demonstrate the nature of this specific drug conspiracy and that there was no "tremendous prejudice at this point to the defendants because no one is named as being responsible for the shooting." Additionally, the indictment charged that as part of the conspiracy, Nate Hill and others "possessed firearms during and in relation to the cocaine conspiracy to provide security for the conspiracy." Obviously, the fact that members of the conspiracy were shot or assaulted provides an explanation as to why the conspirators believed they needed firearms to protect themselves. Furthermore, over the thirteen day trial, the testimony concerning the shooting and assaults was extremely brief in comparison to the amount of evidence introduced by the government. Finally, the introduction of this evidence allowed the jury to have a complete picture of the conspiracy, ensuring an informed and fair decision was rendered. *See Pulido*, 69 F.3d at 202 ("[T]he exclusion of evidence concerning the triple murder at the Drake Avenue apartment would have created a 'chronological and conceptual void' in the government's case against Pulido, leaving jurors with significant questions about Lopez' relationship with Pulido and Lopez' decision to cooperate with the government."); *United States v. McNeese*, 901 F.2d 585, 599 (7th Cir. 1990) (This court held that it was not an abuse of discretion for the district court to allow evidence of an attempted murder as part of the relevant and admissible evidence in a drug conspiracy trial because the exclusion of the attempted murder evidence in that case would have left a "chronological and conceptual void" in the account of events surrounding the role of one of the co-conspirators in the drug conspiracy); *United States v. Vretta*, 790

F.2d 651, 656 (7th Cir. 1986) (exclusion of evidence would leave jury with "a sanitized version of the crime with too many gaps and questions left dangling . . . thus forcing the jury to speculate."). Accordingly, we refuse to hold that the trial court committed reversible error when admitting evidence concerning the shooting and assault of various members of the conspiracy.

Lambert also argues that the district judge committed reversible error when admitting evidence concerning his possession of firearms. Lambert admits that some evidence regarding his possession of firearms would be relevant, but contends that the amount of evidence introduced by the government concerning his possession of firearms amounted to "prosecutorial overkill." As stated above, evidence is relevant and admissible if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401 and 402.

In this case, evidence was introduced to establish that not only did Lambert carry a gun for protection but that he also attempted to transport a large number of weapons from California to Chicago on behalf of the conspiracy. As we have stated in the past, "firearms are recognized as tools of the drug trade; thus, courts have sustained the admission of weapons evidence in narcotics cases because the possession of a weapon is often a hallmark of drug trafficking." *United States v. Hubbard*, 61 F.3d 1261, 1270 (7th Cir. 1995). In light of the fact that evidence of weapon possession is typically relevant in drug cases and especially considering Lambert's admission that his possession of firearms was relevant evidence in this case, his argument that the government introduced "too much" relevant evidence concerning his possession of weapons is patently without merit.

Lambert's final argument on appeal is that he received the ineffective assistance of counsel because of his trial counsel's acquiescence to the judge's proposed method of

resolving Adam's situation, trial counsel's failure to make timely objections, and counsel's failure to request a limiting instruction as to the "other-crimes evidence."

> Ordinarily, this issue is not appropriate for direct review because "we have repeatedly held that ineffective assistance of counsel claims are best dealt with at the district court level brought through a motion for a new trial or through collateral relief available under 28 U.S.C. § 2255." [*United States v. Mojica*, 984 F.2d 1426, 1452 (7th Cir. 1993)] (citations omitted). "The reason for this preference is that 'the district court, unlike the appellate court, has had the opportunity to observe counsel's performance firsthand,' and typically, there has been no chance to develop and include in the record evidence relating to the ineffectiveness issues." *Id.* (quotation and citation omitted). Nevertheless, this court has held on a number of occasions that "we have the discretion to resolve ineffective assistance claims without the benefit of the district court's views in circumstances where the record is 'sufficiently developed' to consider the issue, or where 'both parties ask us to resolve the matter, the question has been briefed and argued, . . . and the entire trial record is before us'" *id.* (quotations omitted), or where "the issue is sufficiently clear-cut." *United States v. Zarnes*, 33 F.3d 1454, 1473 (7th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 2286, 132 L. Ed.2d 288 (quoting *United States v. Limehouse*, 950 F.2d 501, 503 (7th Cir. 1991), *cert. denied*, 504 U.S. 918, 112 S. Ct. 1962, 118 L. Ed.2d 563 (1992)). Both parties have briefed . . . the issue before us, we have reviewed the record, and for the reasons explained herein, the issue of ineffective assistance of counsel is sufficiently developed to allow our review. Thus, we deem it advisable to review the merits of [Lambert's] claim.

United States v. Boyles, 57 F.3d 535, 550 (7th Cir. 1995) (citation in original).

With regard to Lambert's claim that his trial counsel was ineffective in dealing with the question of the excused juror, it was imperative that the trial judge ascertain Adam's status before making a decision whether to adjourn the trial and hold the jury panel longer, continue with the eleven jurors, or declare a mistrial. *See Araujo*, 62 F.3d at 934. Even now, with the benefit of hindsight, we see no error with the decision to allow the district court to contact Adam *ex parte* and ascertain her availability. The fact that Lambert's counsel also saw no problem with this arrangement at the very time the decision was in the making can not, now, under any stretch of the imagination, be considered ineffective assistance of counsel.[8]

Lambert's second claim of ineffective assistance, that trial counsel failed to make timely objections and request a limiting instruction, fares no better. As discussed in length previously in the opinion, the trial judge committed no error in admitting the evidence Lambert now complains of. Obviously, counsel can not be considered ineffective for failing to make an objection to the introduction of evidence that was properly admitted. *See e.g.*, *United States v. Draves*, 103 F.3d 1328, 1335-36 (7th Cir.),

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[8] We see no reason why an objection to the procedure used by the judge should have been made especially given, "the pervasive use . . . of telephone and related services." *See Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1252 (7th Cir. 1989). In fact, telephones are used to conduct pre-trial motions, hear oral argument, and even issue warrants. *See e.g.*, Fed. R. App. P. 16(c); Fed. R. Crim. P. 41(c)(2). As we move forward into the electronic age, we are attempting to make the court friendly to jurors, litigants, court employees, and those who are called into court, i.e. witnesses. In this case, rather than waste the taxpayers' money, inconvenience the jury by adjourning, and delaying the next case, the trial judge merely adopted a commonly used procedure to ascertain Adam's availability. As such, in a time of unparalleled increases in federal litigation, we can not disagree with the judge's decision to telephone Adam; a decision which increases the court's productivity and improves case management.

cert. denied, 521 U.S. 1127 (1997); *Boyles*, 57 F.3d at 550. From our review, we are convinced that Lambert did not receive the ineffective assistance of counsel.

Sharon Neeley

On appeal, Neeley argues that because her participation in the real estate transactions, American Tour, and Pocketown was minor when compared to the conspiracy as a whole, the district court's denial of her request for a minor participant reduction pursuant to U.S.S.G. § 3B1.2[9] was erroneous and warrants a remand for resentencing. We review the district court's § 3B1.2 determination under the clearly erroneous standard. *See United States v. Soto*, 48 F.3d 1415, 1420 (7th Cir. 1995). "'The district court's sentence thus will be affirmed if it results from a proper application of the sentencing guidelines to facts not found to be clearly erroneous.'" *Id.* (quoting *United States v. Herrera*, 878 F.2d 997, 1000 (7th Cir. 1989)).

Neeley asserts that she was entitled to a reduction in her offense level under § 3B1.2 because she merely acted as a clerk who paid bills and kept corporate paper in order, i.e., that she had a minor role in the money laundering conspiracy. In so arguing, Neeley is asking us to focus on the conspiracy as a whole and not the specific criminal activity, within the overall conspiracy, she was convicted of. In determining the applicability of § 3B1.2, however, "'the relevant inquiry is whether the defendant was a minor participant in the crime for which [she] was

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[9] Section 3B1.2 states:

> Based on the defendant's role in the offense, decrease the offense level as follows:
>
> (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
>
> (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

convicted, not whether [she] was a minor participant in some broader conspiracy that may have surrounded it.'" *United States v. Griffin*, 150 F.3d 778, 787 (7th Cir. 1998) (quoting *United States v. Brown*, 136 F.3d 1176, 1185-86 (7th Cir. 1998)).

As discussed at length earlier in the opinion, Neeley laundered much of Hill's drug money through a number of real estate transactions on his behalf, including the Polk Street Apartment building, the Flossmoor house, and the Matteson house. Even Neeley's counsel on appeal concedes that with respect to her laundering money through real estate transactions, "it is true that she was not a minor actor." Neeley's counsel argues that we should not focus on Neeley's real estate transactions but rather on her role at American and Pocketown. Neeley argues that her position at American mandates that she be considered a minor participant when the conspiracy is viewed as a whole. We do not agree that we should have so singular a focus.

As discussed above, one of Hill's methods to hide the proceeds of his drug business was to launder money through Pocketown and its parent company American Tour. Neeley was involved in the daily operations of Pocketown, and was in charge of all of Pocketown's bills, corporate papers, stock certificates, and contracts. Neeley also assisted Pocketown in the locating and purchasing of two apartments in New York on Hill's behalf. In obtaining one of the apartments, Neeley represented herself to be the manager of Pocketown. Additionally, Neeley was the sole signatory on two of Pocketown's corporate accounts and was also responsible for depositing various cash amounts into those accounts. Based on the record before us, we do not agree with the defendant's arguments and find it inconceivable that Neeley could be considered a minor participant in the money laundering conspiracy for which she was indicted and convicted. *See Griffin*, 150 F.3d at 787; *Brown*, 136 F.3d at 1185-86. Accordingly, we are of the opinion that the district court did not commit

error, clear or otherwise, in denying Neeley's request for a minor participant reduction.

Albert Alexander Alvarez

Defendant-appellant Alvarez argues that the trial court erred in refusing to allow him to withdraw his guilty plea because he was not psychologically competent to enter into a plea of guilty. Alvarez also argues that the district judge committed reversible error when he refused to order a psychiatric evaluation of Alvarez before denying the motion to withdraw his guilty plea. We do not agree with Alvarez's characterization of events.

It is now axiomatic that

> [n]o defendant has an absolute right to withdraw a guilty plea. *United States v. Schilling*, 142 F.3d 388, 398 (7th Cir. 1998). Prior to sentencing a district court may permit withdrawal if presented with a "fair and just" reason, Fed. R. Crim. P. 32(e); *United States v. Abdul*, 75 F.3d 327, 329 (7th Cir. 1996), but the burden of justifying relief rests with the defendant, *United States v. Coonce*, 961 F.2d 1268, 1275 (7th Cir. 1992). Absent clear error we must accept a district court's findings about the propriety of the reasons given for seeking to set aside a guilty plea. *Schilling*, 142 F.3d at 398. And because the decision whether to permit withdrawal is one committed to the district court's discretion, *Abdul*, 75 F.3d at 329, we will uphold the denial of a motion to withdraw a guilty plea unless that discretion is abused, *Schilling*, 142 F.3d at 398.

United States v. Underwood, 174 F.3d 850, 852-53 (7th Cir. 1999); *see also Schilling*, 142 F.3d at 398. Furthermore, "[w]hen a defendant wishes to withdraw his plea [of guilty] after he states at a Rule 11 hearing that it was freely and knowingly given, he faces an uphill battle in persuading the judge that his purported reason for withdrawing his plea is fair and just." *Schilling*, 142 F.3d at

398 (internal quotations and citations omitted); *see also United States v. Messino*, 55 F.3d 1241, 1248 (7th Cir. 1995); *United States v. Trussel*, 961 F.2d 685, 689 (7th Cir. 1992). Alvarez has failed to convince us that the district court committed error.

Prior to accepting Alvarez's guilty plea, the trial judge conducted a thorough examination of the defendant, during which time Alvarez's answers were both coherent and responsive. It was only after having had the opportunity to assess his responses, demeanor, conduct, and appearance, that the judge determined that Alvarez was competent. Additionally, when queried by the same judge, neither his own counsel nor the government were cognizant of any manifestations of mental incapacity or any other reason to question Alvarez's competence to enter a plea of guilty. Furthermore, the district court conducted a lengthy Rule 11 plea colloquy during which Alvarez consistently stated that he understood all the consequences of pleading guilty. Finally, Alvarez, at the court's request, gave a short narrative of his role in the offense. The trial judge found that these factors, when combined, undercut any argument that Alvarez should be permitted to withdraw his guilty plea.

We are convinced that the lengthy and coherent exchange between the district court judge and Alvarez during the Rule 11 colloquy demonstrates that Alvarez was competent to plead guilty and that he understood the legal consequence of doing so. As the trial judge did, we find it very interesting that Alvarez did not even attempt to withdraw his guilty plea until after a similarly situated co-defendant in the Hill organization was acquitted. After our review of the record, we refuse to hold that the district court committed error in denying the motion to withdraw Alvarez's guilty plea. For the same reasons discussed before, we also refuse to hold that the district court abused his discretion in denying Alvarez's request for a psychiatric examination. *See United States v. Rovetuso*, 768 F.2d 809, 824-25 (7th Cir. 1985).

IV. CONCLUSION

We conclude that the trial judge did not err in refusing to grant Lambert's motion for a mistrial after excusing a juror and proceeding with 11 jurors over his objection. Also, the trial judge correctly admitted evidence that other conspiracy members had been shot and assaulted as relevant evidence of the nature of the drug conspiracy and evidence that Lambert possessed firearms during the course of the drug conspiracy. Finally, the record does not support Lambert's assertions that he received the ineffective assistance of trial counsel. With regard to Neeley, we hold that the sentencing judge committed no error when refusing to sentence her as a minor participant under U.S.S.G. § 3B1.2. Finally, Alvarez's argument that the district judge erred in refusing to allow him to withdraw his guilty plea and abused his discretion in denying his motion for a psychological evaluation is without merit.

Accordingly, the sentences and convictions of Lambert, Neeley, and Alvarez are

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, IL 60604

October 20, 1999

Before

Hon. John L. Coffey, *Circuit Judge*
Hon. Joel M. Flaum, *Circuit Judge*
Hon. Frank H. Easterbrook, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

No. 97-2834

DEMETRIUS LAMBERT,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 95 CR 730

Charles P. Kocoras, *Judge*

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* filed in the above-entitled case on October 5, 1999, by the defendant-appellant, no judge in active service has requested a vote thereon, and all of

the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX C

Tr. 3266-3303[1]

[Tr. 3266] [Dec. 9, 1996, 10:15 a.m.]

THE CLERK: 95 CR 730, U.S. vs. Lambert, et al. On trial.

MS. COUGHLIN: Good morning, your Honor, Colleen Coughlin on behalf of the United States, and Dan Gillogly.

MR. THEIS: Good morning, your Honor, John Theis. represent Charles Thomas. Mr. Thomas is also present.

Your Honor, I understand Mr. Gleicher had a matter at 26th Street this morning.

THE COURT: Yes, he called a couple of times. He is on his way here.

MR. THEIS: Did you want to

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[1] These pages include all relevant proceedings on Dec. 9 and 10, 1996; we have omitted Tr. 3296-97, bearing the case caption and indicating persons present.

wait for him or do you want me to step up?

THE COURT: Well, we will probably have to wait for him, but I thought I would wait at least apprise you of why I had you come in.

We have Mr. Bailey here.

Is Mr. Lambert here?

MR. BAILEY: Yes.

THE COURT: Mr. Paar, is he here?

Mr. Paar is here. Mr. Lopez is here.

Where is Mr. Lopez?

MS. COUGHLIN: He was here a second ago.

THE DEFENDANT PAAR: He is on his way.

MR. BAILEY: I think he is outside.

THE COURT: Mr. Theis is here.

[Tr. 3267] So, we are just missing Mr. Halprin and Mr. Gleicher.

MR. THEIS: And Ms. Neeley.

THE COURT: Oh, and Ms. Neeley. Did somebody get a hold of her?

MR. THEIS: Judge, the message my office got was the lawyers and defendants. So, I assume they got the same message.

THE COURT: Here is the situation, for your benefit, until the others arrive. There was a message left on the answering machine for my chambers, which came in Sunday yesterday -- the essence of which is that Ms. Adam -- Mary Adam, the juror who I talked to once before with your approval with respect to her grandson, who is about six or seven months old. He was in the hospital with a head wound. And we were worried about her

condition. And I talked to her and she told me that the child was going to be okay; he was still in the hospital.

And she mentioned to me at the time that somehow DCFS had some involvement and they wanted the child to stay in the hospital a day longer. But she didn't seem particularly troubled by that, nor did I, the way she told me that.

I did not know there was any feature to the transaction, as it were.

In any event, the message that was left essentially is as follows: That she has to attend a custody hearing today *[Tr. 3268]* because DCFS is trying to take the kids away -- this is plural. "She apologizes for causing you a problem," and says I can replace her and the hearing is in Kane County.

So, apparently the situation is much more complicated than either she imagined or I imagined with the DCFS situation.

So, we have the following options, it seems to me:
One, we wait for her to come back, assuming it is not unreasonably long. She will not be here today.

Two, we excuse her by agreement and let the other eleven work.

Three, after hearing from you all, at least I have some discretion to determine whether there is just cause to excuse her; which, under the rules, that is the criteria.

And, Four, excuse her one way or other and re-set the first alternate, who is Dr. Testone, who I excused on Friday.

That is, as in the modern world -- Mr. Lopez is choked up back there.

(Laughter.)

THE COURT: He seems to choke up now when I talk.

In the parlance of our electronic world, those are, it seems to me -- that is the menu of options. I may be missing something, but I think that is the potpourri of choices.

I know we are not all here, so I will not do anything definitive until at least it is clear to me they are not coming after I waited. We got word out to everybody to be here at *[Tr. 3269]* 10:00 o'clock. It is now approaching 10:30. And the word got out around 9:15.

So, I would like to at least hear from those present what your

thoughts are on the subject.

What does the government think? Do you have any thoughts about it?

MS. COUGHLIN: Your Honor, I believe that under the rules, replacing -- and under the Supreme Court; Alano, I believe, it is -- replacing it with an alternate is not a favored alternative.

THE COURT: Yes, this is my least favored choice. I am aware that it can be done under certain circumstances. I am not, in this circumstance, fond of it because I did excuse both the alternates and it was Friday and this is Monday. And that is not very appealing to me. But it can be done under some circumstances; and, whether this is a right circumstance or not, who knows.

MS. COUGHLIN: I would inform the Court and defense counsel that Mr.

Gillogly and I ran into the doctor as he was leaving the building Friday and had a brief conversation with him about his daughter in law school, and that was the sum of the conversation. But we did speak with him.

As to the other alternatives, right now it does not seem as though it would be -- we would need to dismiss her, assuming she can be here to deliberate further starting *[Tr. 3270]* tomorrow; and, assuming that whatever is happening in Kane County has not so distracted her or now put her as the custodian of the children, which would change her conditions considerable.

THE COURT: Would the government be willing to agree to a verdict of eleven?

MS. COUGHLIN: Yes, Judge.

THE COURT: What is your

reaction?

MR. BAILEY: Do not even ask, Judge. Do not even ask.

THE COURT: Why not?

(Laughter.)

THE COURT: Give it a chance, Mr. Bailey.

MR. LOPEZ: Judge, there is a case in the district called United States vs. Arroyo, which is almost right on point. It is a case that I tried before Judge Hart in a snow storm. And we missed jurors for two days in a row because of the weather in Chicago in January of '94.

And although we objected, Judge Hart went with the eleven and found there was just cause; and, I believe, in that opinion written by Judge Rovner, it pretty much details some of the things that the Court should

look at in determining the just excuse issue.

I do not believe that at this point that going with eleven -- I am not going to agree to eleven. I would ask for a *[Tr. 3271]* mistrial, obviously. But I do not believe that there is just cause at this time and I believe that the Court -- at least Mr. Paar and I believe the rest of the defendants -- believe that the Court should wait and make a further inquiry to see if she will be available to deliberate starting tomorrow morning.

MR. BAILEY: We have no objection to waiting, Judge. We do object to a verdict of eleven.

THE COURT: Well, I did not call her. Do I have your permission to call her and at least get a better handle on the situation?

MS. COUGHLIN: Yes.

MR. LOPEZ: Yes, Judge.

MR. BAILEY: That sounds intelligent to me, Judge, to find out if it is definite that she will be available in the morning. Fine.

THE COURT: All right. That is probably the better course of action.

I do not, frankly, see -- I have given the others enough time to get here and I do not see -- I have at least your permission to call her, everyone who is here?

MR. BAILEY: Yes.

THE COURT: I think that is the prudent thing to do. Let me call her. Stay here and I will report back on the subject of my discussions with her. Okay?

MS. COUGHLIN: That is fine.

[Tr. 3272]

THE COURT: All right.

(Brief pause.)

THE COURT: All right. The record should reflect Mr. Halprin is here, but Mr. Gleicher is not yet here, although he called, again, to say he is breaking all of the speed laws getting here.

Well, not all of them. I think just the mile per hour limitation.

(Laughter.)

THE COURT: I think he is not blowing stop signs, but who knows.

Well, I think, quite frankly, you can -- I have given them a fair chance to be here and what I propose to do I do not think is all that controversial, and it is in keeping with the wishes of counsel who are before me.

I did talk to Ms. Adam. She is obviously in some state of anxiety.

There is a 1:00 o'clock hearing today in Kane County before Judge Morgan. It involves the three children of her daughter, although she says -- Ms. Adam says -- it is only with respect to this incident and this kid; and, the way it sound from Ms. Adam, DCFS has jumped the gun and come to conclusions that are entirely inappropriate and unsupported. You could tell that in her voice -- that there is nothing there, according to Ms. Adam.

She does feel mentally drained; and, I asked her *[Tr. 3273]* mental state: Assuming everything was okay, whether she could come back here and deliberate with a decent mental state. And she and I both agreed that the only answer to that question is what will come out of the hearing.

I think if the hearing is

either unduly prolonged or if it has an adverse decision, then we are going to have to revisit the question of Ms. Adam's continued presence as a juror. That is my sense.

She does expect the hearing to go forward. They scrambled over the weekend to get a lawyer, and they did get one. So, she thinks there will be -- whatever the presentation is. Needless to say, she is not familiar with this kind of thing.

MR. HALPRIN: Is it a petition to --

THE COURT: Apparently so. A petition to take the --

MR. HALPRIN: To take the kids away?

THE COURT: Yes, that is the way it sounds like. She said -- the answering machine said that DCFS is

trying to take the kids away. There are three kids. So, over apparently this one incident -- this child is either six or seven months old and, of course, cannot talk. So, they have to piece together whatever they are piecing together.

Ms. Adam, who strikes as a responsible lady; and, in my chat with her, I thought she was quite rationale and sober and together. *[Tr. 3274]*

Of course, that has nothing to do with her daughter, necessarily, but that this would not be the kind of family where this kind of situation would take place. Of course, who is to say. I am not trying a custody hearing here.

But I have no reason to think there is anything to this, other than someone at DCFS -- one person, she says

-- has brought this about over one incident. And there is nothing to it. And there is no reason for me to doubt that.

The question is whether, if things do not go well or if they take too long, whether we are going to be able to have a viable juror.

So, I think this: It is rather unpalatable to me, but I think it is the only reasonable option at this point. It is unpalatable to me because we have had a couple of lurches in this case. We have had some delays. Through nobody's fault. I mean, these things happen. But this jury is now getting a little long in the tooth, in terms of its service, and longer than I told them. And there is always the concern that something bad will happen, in terms of them not doing what the law expects them to do, and

deliberate in a reasonable amount of time.

But I think we are going to have to continue the matter at least until tomorrow and see how Ms. Adam does. I asked her to call my chambers as soon as she knows something from the hearing. But I think that is what we have to do. *[Tr. 3275]*

If it is one day, I think I have to do it. But if it gets very complicated, then I think the notion of just cause would be very prominent in my thoughts.

Does anybody want to speak to that?

MR. HALPRIN: I just need -- I have not read a case on this in a long time.

THE COURT: Lopez will tell you -- Mr. Lopez will tell you -- all about

the case that he personally tried with Judge Hart in the winter of '94, I guess.

MR. HALPRIN: Judge, I assume he brought some authority to your attention?

THE COURT: Well, the authority -- I mean, it is like anything else where a judge has discretion.

MR. HALPRIN: Right.

THE COURT: Just cause, it cannot be a fickle reason, obviously, and I am not looking for a fickle reason. On the other hand, you have to take the facts and circumstances at hand here. And what we have here is a jury that is ready to go. We are longer than we should have been. This trial has taken now -- what are we, in our sixth week?

How long was your case before

Judge Hart?

MR. LOPEZ: One week.

THE COURT: One week?

MR. LOPEZ: Seven days.

THE COURT: There are cases that go all different *[Tr. 3276]* kinds of ways.

MR. HALPRIN: I am sure there are.

THE COURT: There is a case that says a prior business commitment was reason enough for just cause to get rid of that juror. One would not think so, but that was the case.

Here, we have a long trial, lots of defendants, a good jury, we excused the two alternates, we are longer than all of us expected to be, and we have a situation which either does or does not play on a woman's mind.

MR. HALPRIN: Judge, I wonder

if you would consider calling the first alternate back?

THE COURT: Well, we talked about that, but I did not think you all were hot about that.

What is your feeling about having the first alternate come back?

MR. HALPRIN: I suppose I will have to confer with counsel. My feeling was it was quite all right until Mr. Bailey told me it wasn't. So, I need to find out why I am wrong.

I am sure I am, but I would like to know why.

(Laughter.)

MR. THEIS: The other possibility is the second alternate, but we will talk about that as well, because of the added problem with the conversation that they had with him, which was obviously not about the

substance of the case, but -- *[Tr. 3277]*

THE COURT: About his daughter being in law school?

MS. COUGHLIN: Right.

MR. THEIS: Well, Judge, it does create a relationship with the juror that is --

MR. HALPRIN: Colleen, did you talk to him?

MS. COUGHLIN: Yes, we ran into him coming into the building.

MR. HALPRIN: It would have to be the second. They talked to the first alternate juror.

THE COURT: I talked to both of them.

MR. HALPRIN: Well, it is okay if you do it.

THE COURT: I wept and cried and apologized for about an hour back there.

(Laughter.)

MR. HALPRIN: I could live with the second one if the first one has been compromised in any way. It was the fellow who sat by --

THE COURT: I know who he is.

Can you all live with the second one?

MR. HALPRIN: Absolutely.

MR. LOPEZ: Oh, absolutely.

THE COURT: Well, all of a sudden this absolute comes out of the woodwork.

(Laughter.)

MR. HALPRIN: You know, he is not tainted in any way. *[Tr. 3278]*

THE COURT: I personally would not have a qualm with either fellow; but, if you object to the first -- I have to do this by agreement, you understand.

MR. THEIS: Judge, the other think I would probably do before I would -- I am not on the absolutely keen --

THE COURT: Here is the problem.

MR. BAILEY: I am not, either.

THE COURT: I am all for getting the first fellow in here, if we can. I am sure he is back at work today. So, I do not think we -- any way you look at it -- we have lost the day.

MR. HALPRIN: Right.

MR. THEIS: Judge --

THE COURT: Maybe the back -- go ahead.

MR. THEIS: I would, maybe just as a minimum, like some inquiry of any juror that we have to bring back as to whether he talked about the case with other people.

I have a feeling at this point

they did. They weren't under the same admonition that they were during the trial. And, I mean --

THE COURT: Well, the real question is whether he would have an open mind and could decide the case fairly an be uninfluenced by --

MR. HALPRIN: Could I suggest this, Judge: Let all of us meed. Perhaps --

THE COURT: What? *[Tr. 3279]*

MR. HALPRIN: If we could agree on an alternate, and then your Honor might have him here ready to go no matter what happens tomorrow, and we will proceed.

Does that make sense?

THE COURT: Let me propose something to you.

MR. BAILEY: Let's talk.

MR. HALPRIN: I said we would

talk about it.

THE COURT: Maybe this is the best answer.

Well, talk among yourselves. I think no matter what, we cannot get that alternate in here today, even if you all agreed to that. I think it is unlikely, but who knows. Maybe we could get him here at 1:00 and save the day.

Why do you not talk about that possibility. Think about that and let the government think about that.

MR. THEIS: How did you leave it with Ms. Adam?

THE COURT: She is going to go the hearing and call me when she has something to tell me sometime today.

MR. THEIS: Today.

MR. HALPRIN: Could you give us five or ten minutes?

THE COURT: Yes, but the jury

has been instructed not to deliberate. So --

MR. LOPEZ: Why do you not excuse them?

MR. BAILEY: Excuse them.

THE COURT: Well, what if you all agreed to the alternate and somehow -- *[Tr. 3280]*

MS. COUGHLIN: We can't all agree. We are not all here.

THE COURT: Well, I mean, Mr. Gleicher is on his way. He will be here momentarily. I would not do this without him agreeing.

MS. COUGHLIN: Okay.

THE COURT: Well, talk about it, but I have to do something with the jury.

By the way, the other alternate; he lives in Lake Zurich, which is just south of the

Canadian Northwest territory.

(Laughter.)

(Brief pause.)

MR. BAILEY: We have a plan.

THE COURT: You, the defense, has a plan?

MR. BAILEY: The defense has a plan.

THE COURT: Share it with me and the prosecution.

MR. BAILEY: We think that what your Honor ought to do is excuse this jury for the day, see what Mary Adam's situation is. We would prefer, if at all possible, to go forward with Mary Adam in the morning as the twelfth sitting juror.

In the meantime, we think that your Honor might also have the second alternate appear in the morning in case Mary Adam is unable to go ahead in the

morning. And, then, we can find out if he has done something since Friday that would *[Tr. 3281]* disqualify him; and, if he has not, we would go ahead with him as the twelfth juror.

THE COURT: What is the government's notion of that?

MS. COUGHLIN: Well, Judge, first of all, obviously, it seems like the rational thing to do today would be to excuse the jury.

THE COURT: Right.

MS. COUGHLIN: That in the morning, the Court make an inquiry of Ms. Adam, in terms of her ability to continue to deliberate.

THE COURT: I will probably know that today.

MR. BAILEY: Sure.

MS. COUGHLIN: So, we would be also concerned, Judge, regardless of the

outcome of the hearing, whether it has in any way affected her ability to be fair to both sides in this particular proceeding.

THE COURT: No question. I mean, I do not know how that necessarily transposes to fairness, but just the mental state and an ability to -- do you mean because of their position as a defendant in that case?

MS. COUGHLIN: Yes, against the State.

MR. BAILEY: Well, Judge, a little firsthand experience with off juries and arrogant governmental action should not disqualify a juror.

(Laughter.)

[Tr. 3282]

THE COURT: According to her, arbitrary State action.

(Laughter.)

THE COURT: No, after five weeks, I do not think she could say the government's action in this case was arbitrary.

Well, okay. I would make those inquiries. She is obviously the preferred first choice -- her continuation. I think they agree to that, too.

Where do you stand on -- assuming she does not pass the test -- one of two or three or whatever number of tests I have out there --

MS. COUGHLIN: Judge, I am not fully comfortable with saying we should go with an alternate until I take another look at the case law as to what position that puts us in on appeal.

THE COURT: Well, I think if it is done by agreement -- and I would have to have everyone's agreement to this --

only if I have everyone's agreement would I do that. I would not do that on my own, and I need everyone's agreement.

MR. BAILEY: What are we talking about?

THE COURT: Both sides' agreement. But if it is clear to me that she cannot reasonably continue -- for one reason or another -- then it is clear to me I can excuse her and we can go with eleven, and there would not be a necessity of having twelve.

MS. COUGHLIN: Right.

THE COURT: Now, having twelve, because, you know, *[Tr. 3283]* this jury I thought was quite compatible and we are back to twelve, which is what the magic number is -- I mean, there is an argument to be made for that.

But one way or another, if Ms. Adam -- it seems to me somewhat clear if

Ms. Adam cannot continue, then I have to get rid of her.

MR. THEIS: Judge, I assume there is no downside in asking Mr. Powers to appear here tomorrow morning, even if they change their minds.

THE COURT: Well, the only downside is to him. Here is what you say: Have him come in here, let me inquire either in your presence or out of your presence whether he is mentally fit to serve or whether something happened between Friday and now Tuesday, which would render him unable; and, if he is not, send him back home.

I would not do that. I think you would have to give me license to talk to him on the phone today, to make preliminary inquiry of my own to see whether -- I do not want to have him come down here and say, "Oh, by the way,

you cannot serve."

MR. HALPRIN: That is fine.

THE COURT: That is not fair to him.

MR. BAILEY: You have my permission to do that, Judge.

MR. THEIS: That is fine.

[Tr. 3284]

MS. COUGHLIN: I agree with that, Judge.

MR. THEIS: I am not unsympathetic to his individual problems. I didn't mean to suggest that. I just a mean that --

MR. HALPRIN: It would seem that way, we would be guaranteed going ahead with twelve tomorrow no matter what happens.

THE COURT: Well, I would have to have the government's agreement to that.

MS. COUGHLIN: We will have to get back to you on that. Obviously, we have to make sure it --

THE COURT: Okay. That is fine.

All right. Here is what we need to do now. I am spending a lot of time on bended knee with this jury. I am going to excuse them for the day. I would like your permission to do that in the jury room. I do not want to drag them out here and make a --

MR. BAILEY: You have it, Judge.

MR. HALPRIN: No problem.

THE COURT: All right.

Does any defendant have any objection to that?

(No response.)

THE COURT: Here is what I am going to tell them. I am going to tell

them, "Look, obviously Ms. Adam is not here." I will not go into detail on her personal situation. *[Tr. 3285]*

I will simply tell them that a personal matter came up that was absolutely unavoidable; and, she would rather be here, but she cannot be here. And in order to accommodate her, it is necessary for me to recess.

I am going to tell them, also, that the law has a number of restrictions in terms of -- they are going to think, "Why can we not replace her?" So, I am going to tell them the law -- I am going to be a little bit vague about it, since the law is, itself, not all that clear.

MR. THEIS: And we may end up doing it.

THE COURT: Right.

MR. THEIS: After telling them

we can't.

THE COURT: That there have to be certain circumstances present before we either continue without her or continue with the replacement, and those circumstances have not yet come to pass. Okay?

I guess that is a good way to put it.

MS. COUGHLIN: That sounds fine.

THE COURT: And for them to bear with me; but that, realistically speaking, one way or another, when they return tomorrow, they will be able to resume their deliberations.

That is about the essence of what I am going to tell them.

MR. BAILEY: It sounds good.

THE COURT: Is there anyone objecting to that? *[Tr. 3286]*

MS. COUGHLIN: No, Judge.

MR. THEIS: No, Judge.

And maybe we could also state for the record that Ms. Neeley is here and, with her permission, I will speak for Mr. Gleicher as well, if you want to do that.

THE COURT: All right.

Mr. Gleicher was summoned at 9:15 and he got tied up. We have a juror who is not here today and we are trying to deal with that situation. Would you have any objection to having one of the other lawyers stand in for Mr. Gleicher?

THE DEFENDANT NEELEY: No.

THE COURT: They are all unanimous as to how we should which you just heard me outline.

Do you have any objection to me proceeding that way?

THE DEFENDANT NEELEY: No, I

do not.

THE COURT: All right. Then that is how we will do it.

Let me ask you to wait in the courtroom so you do not bump into them as they go. All right?

MR. BAILEY: Okay. Thank you.

THE COURT: Sit tight.

(Brief pause.)

THE COURT: I need to talk to you about one other thing. It is not a big deal, but I want to make a record about it. *[Tr. 3287]*

All right. I told the jury essentially what I told you and they seemed in reasonably good spirits.

The only thing I want to mention to you is one of the jurors -- it turns out to be the foreman -- brought in two charts today; and Jerry, the CSO, wanted to see what he was

bringing in, because he was a little worried about it.

One of the charts is simply a procedural order for the jury to follow in deliberating. So, whether he brought it in and made it at home and brought it in or did it in there, there is nothing wrong with that.

The other chart simply sets forth the principle that all of the jurors have to be unanimous in their verdict. That is the guidepost.

So, I told Jerry to tell the foreman that we are going to give him these -- he has them on some cardboard. So, it is an outline of how to proceed -- just the steps they are going to use in deliberating. That is the bigger of the two. I told him he could use those and we will leave them in there, since he obviously put some

thought into how to proceed with the deliberations.

But I also told Jerry to tell him not to make any more charts and not to bring in other things from the outside to help with their deliberations.

I looked at them both. There is nothing to either one. But I do not want them to think he has license to start *[Tr. 3288]* getting imaginative on his own.

So, that is where that stands. I just wanted to let you know about that.

Mr. Gleicher, we have excused you from this case.

(Laughter.)

THE COURT: You are banned -- no.

MR. GLEICHER: Your Honor, I

just have to apologize, but those people who insist on observing the Illinois traffic laws will always spoil it for those of us who do not.

(Laughter.)

THE COURT: I told them you were going to break some of the traffic laws, but not all of them. The speed limit I knew you were going to break, but I do not know about the stop signs or red lights.

(Laughter.)

THE COURT: I hope you did not go through any of those.

MR. GLEICHER: I would have, but there were those people in front of me that wouldn't go.

THE COURT: I understand.

MR. LOPEZ: You have to learn how to drive on the shoulder.

(Laughter.)

THE COURT: That is right. You have to get one of those flashing -- you know, that impersonating-an-officer kind *[Tr. 3289]* of thing.

(Laughter.)

THE COURT: We have a juror who is not here today because she has to attend a hearing having do with child custody of her grandchildren.

MR. GLEICHER: Steve kept me apprised of it.

THE COURT: So, what we have done is decided to delay the case for today, the juror is going to call me later today to tell me her situation; and, then, we discussed the possibility that if she cannot attend, potentially having the second alternate, Thomas Powers, come. That is what your compatriots would like.

The government has not

acquiesced to that. It would require everyone's agreement, including the government's, to seat him. And if you all agree, then I would be willing to do that. If not, then I would have to decide what I can do on my own.

So, that is pretty much where we stand.

MR. HALPRIN: But in any event, you were going to talking to Powers, anyway, whether they acquiesce or not. So, you will know if they do acquiesce, that he would be available?

THE COURT: Yes, although I do not plan -- I am not going to make a needless call. So, I will not call him until I hear from Ms. Adam. *[Tr. 3290]*

Now, that hearing is set for 1:00 o'clock. So, I think I would have enough time in the day to deal with that.

MR. BAILEY: Yes, sir.

THE COURT: Let's say she calls me at 2:00 or 3:00. would still have time to have -- call Mr. Powers and then have him call me if he is not home.

Okay. We have a number for him, but I would not call him unless it was clear to me that Ms. Adam was out of the picture. And I would just have him available on the assumption that that is what we are going to do. And, then, that the government would agree to that.

And, then, I also might well on my own interrogate him as to whether there is any reason why he could not be seated, again, in accordance with your wishes. Okay?

So, that is the battle plan. And that is why it is really quite important for you all to probably check in sometime this afternoon.

I do not presently see a need to round you back up, again, but some things are really not doable on the phone, like this. Other things are. But I do not expect any big deviation from the plan that we have set out. Okay?

All right. Thank you very much for your attention.

MR. BAILEY: Thank you, Judge.

MR. LOPEZ: Judge, I have a problem. I talked to my client and I have talked to Mr. Halprin. I may not be able to *[Tr. 3291]* be here until about 11:00 -- 10:30 or 11:00. I do not really see how much more I could add to the arguments. I am going to give him a copy of my decision -- the Arroyo decision -- today. So, I would just asking if I -- for whatever reason, if I am late or if something is going to happen, that Mr. Halprin stand in.

THE COURT: Yes, he can stand in.

Where is your client?

MR. LOPEZ: He went to put some quarters in my parking meter, actually.

THE COURT: Well --

MR. LOPEZ: But I did discuss it with him and he is --

THE COURT: Is it agreeable with him?

MR. LOPEZ: Yes, it is agreeable.

In fact, he likes Mr. Halprin.

THE COURT: Better than you?

MR. LOPEZ: Yes, I think so.

(Laughter.)

MR. HALPRIN: I am here at 9:30, anyway, for a status.

THE COURT: Well, Mr. Lopez, maybe your dad said you talked too much --

MR. LOPEZ: Maybe. I do not know, Judge.

And I had given Steve some information, if could you call a state court judge that denied a continuance for a new trial. He wants us to start a trial tomorrow in Woodstock. *[Tr. 3292]*

THE COURT: Do you want me to call him or can we have Steve call him; and, if he gives Steve --

MR. LOPEZ: Well, he -- from what I understand talking to my local attorney, he feels he is being slighted.

THE COURT: Slighted?

MR. LOPEZ: Slighted by the federal system.

But the other attorney, in my motion I put in there that this case was not supposed to be in the position that we are at right now, and there has been a delay -- we had a couple of delays and

--

THE COURT: How long has he been trying cases, the judge? I mean, cases are supposed to -- I mean, not everything goes smoothly.

MR. LOPEZ: Right.

I think that he thinks that I scheduled this knowing of his trial date. But I can tell you procedurally what happened. As you recall, I was not supposed to start this trial. We had a plea agreement and then we had some problems. I do not want to get into what happened. But whatever it is, our plea agreement fell apart and I had everything scheduled.

THE COURT: All right. Give us the judge's name.

What county is it?

MR. LOPEZ: In McHenry County.

THE COURT: Give us the

judge's name and if you have a phone number, we will call him and tell him that you are before *[Tr. 3293]* us and I will not let you go, and it is because of the nature of the case. It is not a made-up thing, you know.

MR. LOPEZ: Right. It is not a made-up thing; but, you know, your Honor, sometimes some judges take affront at why they are not as important, or whatever the situation is. Some do and most do not.

THE COURT: I will hold my tongue on that.

MR. THEIS: Judge, they didn't bring back the books.

THE COURT: No.

MR.THEIS: We didn't have any problem with it.

THE COURT: You know, what happened is I used this courtroom on

Saturday. I had a trial for the class I teach at John Marshall. And I had a jury in the box -- a bunch of kids, actually -- and these books were among the chairs.

We just put them all in one place. So, I think these must have been the books they used during the trial.

Do you want them to have these?

MR. GLEICHER: It is fine by us, Judge.

MR. THEIS: It is just extra of what they already have.

THE COURT: Do they have everything that is in these books?

MR. GILLOGLY: Yes.

THE COURT: If they do, fine.

And, therefore, they know these exist. So, if they *[Tr. 3294]* want them and ask for them, I am just

going to give them to them. But I just as soon they did not think they needed them at this point.

MR. GILLOGLY: I do not know if some of them used -- took notes on the exhibits as opposed to their little --

THE COURT: Well, they have their little notebooks.

MR. THEIS: Actually, though, we did pull that one exhibit out and replaced it with the other. One of them did have some writing on it. So, some of them may have done that.

Judge, I have no problem if your court officer brings them back there and gives them to them without a request.

THE COURT: Well --

MR. GLEICHER: That is fine with me.

THE COURT: I will not do that

unless they ask for it. If they ask for it, then they need it. If they do not, why do I want to clutter them up with so much stuff?

MR. GILLOGLY: We will leave them there, Judge.

THE COURT: All right.

THE DEFENDANT PAAR: Your Honor, I have no problem with Mr. Halprin stepping in for Mr. Lopez. He is a little bit better than Mr. Lopez, anyway.

(Laughter.)

MR. HALPRIN: Everything is relative, Judge.

THE COURT: What can I say about that?

(Laughter.) *[Tr. 3295]*

MR. HALPRIN: I was hoping you were going to leave it alone.

THE COURT: He has a tad more

hair, too.

(Laughter.)

MR. HALPRIN: Boy, that is a close call.

(Laughter.)

THE COURT: All right.

(Whereupon, an adjournment was taken at 11:15 o'clock a.m., until 9:30 o'clock a.m., of the following day, December 10, 1996.) *[Tr. 3296 & 3297, caption and persons present, omitted] [Tr. 3298] [Dec. 10, 1996, 9:30 a.m.]*

THE CLERK: 95 CR 730, U.S. vs. Lambert, et al. On trial.

MS. COUGHLIN: Good morning, your Honor, Colleen Coughlin, Dan Gillogly and Dan Reinberg on behalf of the United States.

MR. GLEICHER: David Gleicher on behalf of Sharon Neeley, who is on her way here.

MR. THEIS: Good morning, your Honor, John Theis. I represent Charles Thomas.

Your Honor, Mr. Thomas is not here this morning. He called me at home and had a problem he has, among his medical problems, he has a problem with a disc. He was unable to get out of bed. He is in great pain.

He gave me -- I told him about what the possible alternatives were this morning, and I have his permission to do either of what I believe to be the likely alternative.

I also have his phone number if the Court wants to make a direct inquiry.

THE COURT: Well, we did give everyone adequate notice to be here at 9:30; and, since eleven of the jurors are here, I intend to go ahead.

Mr. Lambert not here, Mr. Bailey.

MR. BAILEY: I noticed.

THE COURT: Steve informs me that the marshal informed him that he refused to come over from the MCC today. *[Tr. 3299]*

MR. BAILEY: I know he did not want to, Judge.

THE COURT: Well, he certainly --

MR. BAILEY: That is a waiver of his appearance.

THE COURT: I think it is. I do not need to drag him here because, quite frankly, he will -- he could not have any input on what is going to happen, anyway. It is a question for the lawyers and for the Court.

But let me tell you, then -- I think we have covered all of the

absences.

Is Mr. Lopez here?

MR. HALPRIN: No. I am standing in for him. You took the waiver on the record yesterday.

THE COURT: Yes, we did discuss that.

All right. Here is the situation with Mary Adam. She did call me about 4:05 p.m., and here is the story. Mary Adam has been awarded temporary custody of her daughter's three children. The ages are six, three and six months. She now has three more children to care for than she had before yesterday's session.

She, therefore, will be unable to come back and act as a juror in this case.

The baby is still in the hospital, but she will get the baby as

soon as the child is released.

There is a new hearing set for the 23rd of December, which is two weeks off. And she has custody of two of the *[Tr. 3300]* children, with the third coming. There is no way in the world that she can come here and compete her service as a juror.

Beyond that, she also in her own way in her words said she does not know whether, in light of the case that she is now embroiled in by virtue of her daughter's situation could be a juror in this case.

I talked to her for a few minutes. I think the lady is under considerable stress; and, the fact of that existing case, in my own judgment, as well as apparently in hers, would impact on her ability to be an appropriate juror in this case.

So, there are two bases to excuse her, and I will excuse her because it is clearly pointless after a five-week trial to wait two weeks to see what the outcome of a hearing -- another hearing -- might be, when we do not even know what that would be, anyway.

So, there is ample, it seems to me, just and good reason to excuse her, and I do so.

In light of that phone call, I had Steve call the government to -- I was going to call -- Ms. Neeley is here. The record should reflect that -- call second alternate, as we had discussed yesterday morning; and, the government supplied Steve with a number of cases that deal with the issue of how you handle a situation where one of the regular jurors cannot serve.

And my review of those cases

and I did not look at *[Tr. 3301]* all of them -- is that there is no question that to seat an alternate after the alternate has been discharge, particularly the second alternate, is fraught with peril.

The cases go all over the lot in those circumstances. I will not get into all of the arguments about seating an alternate after some deliberations have taken place, especially since they have not been sequestered, as they have been done in other cases. I did not sequester these two alternates once they were excused; or, I did not kept them on and sequester them. I simply excused them.

There are problems with that and there are also problems with even when there is consent on the part of the defendants and the government, the

matter is necessarily subject to review. And there was precisely a case like that in the Seventh Circuit where a defense lawyer, if he did not agree, at least did not object to the judge's protocol about getting rid of one of the jurors because of a weekend trip.

And the Court of Appeals, of course, had to analyze the issue all over, again.

So, it seems to me, in light of the fact that the rule is quite clear, the government thinks I should not -- I think that is your position -- should not seat the alternate, let alone whether you would give consent or not -- you think that is risky business?

I have not talked to the government about this, but I *[Tr. 3302]* take it that is your position?

MR. GILLOGLY: Very risky

business, Judge.

THE COURT: I think we probably would be okay if we seated that second alternate, but I would not guarantee it.

There is no question in my review -- me decision would have to be reviewed under at least some criteria; and, since the rule is plain that we can proceed with eleven jurors, and since there is not any question in the slightest about the cause that is present to excuse Mary Adam, I am going to excuse her and command the jury to deliberate with eleven. And that will be the result.

MR. HALPRIN: Smith and Paar move for a mistrial under 23(b), Judge.

MR. BAILEY: Lambert moves for a mistrial, also, Judge.

THE COURT: You can all move for a mistrial and all of those motions

will be denied.

MR. THEIS: Yes, we will, Judge.

THE COURT: All right. That is the result.

So, we will tell the jury to commence its deliberations and we will see.

The same standing procedure order will now be at play. You have to be on short personal appearance call, as well as immediate telephone contact, and we will see what goes. Okay? *[Tr. 3303]*

Thank you very much.

MR. GILLOGLY: Judge, for the record, we sent over to each defense counsel the cite to each of -the cases we cited to your Honor, including the Alano case, the Patterson case, the David case, the Sancor case and the McFarland case.

THE COURT: All right.

MR. BAILEY: We received those -- I did, at least, Judge.

THE COURT: Okay.

MR. GILLOGLY: I think everyone did.

THE COURT: Okay.

(Whereupon, a recess was taken as the jury continued their deliberations at 9:45 o'clock a.m.)